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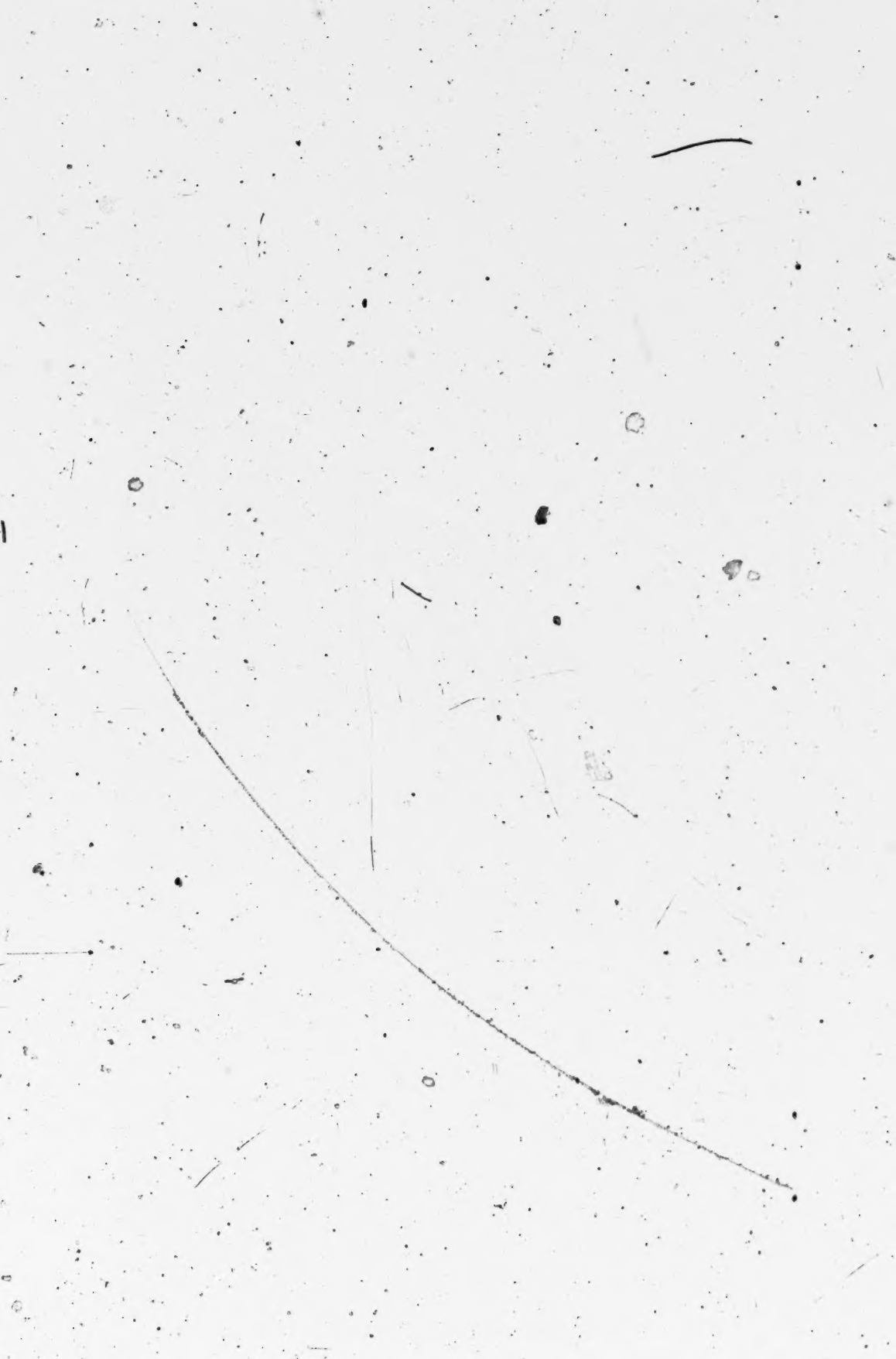
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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

LIPE HENSLEE, INDIVIDUALLY, NOW RESIDING IN DAVIDSON COUNTY, TENNESSEE, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF TENNESSEE, PETITIONER

v.

UNION PLANTERS NATIONAL BANK & TRUST COMPANY; A NATIONAL BANK AT MEMPHIS, TENNESSEE, AND WILBURN K. NOELL, A RESIDENT CITIZEN OF MEMPHIS, TENNESSEE, EXECUTORS OF THE ESTATE OF WILLIAM BATE WILLIAMS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Lipe Henslee, individually, Collector of Internal Revenue for the District of Tennessee, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered

March 15, 1948, reversing the judgment of the District Court for the Middle District of Tennessee, and that the judgment below be summarily reversed on the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256.

OPINIONS BELOW

The opinion of the District Court (R. 41-43) is reported in 74 F. Supp. 113. The opinion of the Circuit Court of Appeals (R. 58-63) is reported in 166 F. 2d 993.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1948 (R. 58). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below departed from the decision of this Court in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, in holding that a charitable bequest in the remainder of the corpus of a testamentary trust is deductible for estate tax purposes under Section 812(d) of the Internal Revenue Code and the applicable Treasury Regulations notwithstanding that the trustees are empowered in their discretion to invade the corpus "for the pleasure, comfort and welfare" of the life beneficiary, the testator's mother.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(d) [As amended by Section 408(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and by Section 511(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. * * * (26 U.S.C. 1940 ed., Supp. V, Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44. *Transfers for public, charitable, religious, etc., uses.*— * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

SEC. 81.46. *Conditional bequests.*— * * *

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The appeal below was from the order of the District Court (R. 45-46) granting the Collector's motion to dismiss the complaint for failure to state a cause of action (R. 39). The material facts as alleged in the complaint and the amendments and exhibits thereto (R. 1-36), and found by the District Court (R. 41-43), may be summarized as follows:

William Bate Williams, the testator, died in 1943 leaving a gross estate of $508,411 and a net estate of $426,899 (R. 1-2). His will directed (R. 12) that the entire net estate be held in trust

for the use and benefit of his mother during her life, that the trustees pay to her $750 monthly out of either the income or corpus, and that—

> In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.
>
> The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose.

Upon the death of the mother the trustees were to convert the estate "as it then exists" into cash, and pay certain specific bequests (R. 14-16). The "balance" was then to be paid in equal shares to four named charities as a "residuary bequest" which was "not to infringe on any of the other legacies hereinbefore provided" (R. 16).

At the time of the testator's death his mother was about eighty-five years of age, and she died three years later. She had property of her own, valued at about $100,000 and yielding an income of $250 to $300 per month, in addition to which she received $16,500 as a creditor of the estate. She owned her own home, and had no dependents or close relatives. Her mode of living was simple and economical, and she never requested from the

trustees any amounts over and above the $750 which they paid to her monthly. (R. 5, 36, 43.)

In the federal estate tax return the executors-trustees sought to deduct from the taxable estate $121,869 as the value of the charitable bequests. The deduction was disallowed on the ground that the bequests had no presently ascertainable value as of the date of the testator's death. The resultant deficiency was paid, claim for refund was filed and denied, and suit for refund followed. (R. 2-4, 42-43.) The Collector moved to dismiss the complaint for failure to state a claim upon which relief could be granted (R. 39), and the District Court sustained the motion on the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256 (R. 43). The Circuit Court of Appeals reversed and remanded the case to the District Court for trial and determination of whether the possibility of invasion of the charitable bequests was "so remote as to be negligible" (R. 63).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding, contrary to the decision of this Court in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, that a charitable bequest in remainder of the corpus of a testamentary trust which admittedly was subject to unlimited invasion for the "pleasure, comfort and welfare" of the life beneficiary was deductible for estate tax purposes under Section 812(d) of the Internal Revenue Code

and the applicable Treasury Regulations, if the prospect of invasion of the charitable bequest was "remote".

(2) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

It is important to the orderly administration of the tax laws that once an issue has been authoritatively determined by this Court, the lower courts adhere to the result. Where the only reason for this Court's granting certiorari in the earlier case is to settle the issue, that purpose would be frustrated by the failure of the lower courts to abide by the decision. In this case, the precise question was resolved in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, which was followed by the District Court herein, but not by the Circuit Court of Appeals. If the decision below is permitted to stand, it will encourage other courts similarly to ignore the result in the *Merchants Bank* case.

1. In the *Merchants Bank* case (p. 261) the testator bequeathed the corpus of a testamentary trust to charities and empowered the trustee to invade the corpus for the "comfort, support, maintenance and/or happiness" of the life beneficiary, his widow. This Court sustained the applicable Treasury Regulations [1] which authorize deductions

[1] The pertinent provisions of Sections 81.44 and 81.46 of Treasury Regulations 105 under the Internal Revenue Code, *supra*, are the same as those of the earlier Regulations approved in the *Merchants Bank* case. Code Section 812 (d), *supra*, is substantially the same as the earlier statutory provision there involved.

for charitable bequests only insofar as they have a "presently ascertainable" value at the testator's death, and held that the extent to which the charitable remainder would be diverted for the "happiness" of the widow was not measurable by any reliable standard. The mere existence of the invasionary power—however unlikely its exercise—sufficed as a matter of law to defeat the deduction of the charitable bequests because (p. 263) the power "brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial".

The plenary power of the trustees in the instant case (R. 12) to invade the trust corpus for the "pleasure, comfort and welfare" of the life beneficiary, the testator's mother, can stand on no different footing. It introduced elements equally speculative for purposes of computing the "presently ascertainable" value of the charitable remainder. Since the extrinsic facts alleged in the complaint, even if proved, could not affect the result, the District Court properly dismissed the complaint on the authority of the *Merchants Bank* case. (R. 43.)

The court below, while professing to be bound by the *Merchants Bank* case (R. 60), in effect refused to accept it as controlling. It reversed the District Court on the theory that the invasionary power itself was not enough to preclude deduction

of the charitable bequests, and remanded the case for trial and determination of whether the possibility of the *exercise* of the power was "so remote as to be negligible". (R. 63.)[2] In so doing the court below adopted a test urged in the dissenting opinion but unequivocally rejected by the majority of this Court in the *Merchants Bank* case. The very *existence* of such an unrestricted power rendered the charitable remainder unmeasurable, and hence non-deductible for estate tax purposes. Whatever facts bearing upon the improbability of exercise of the power might be adduced at a trial, they could have no more relevance here than in the *Merchants Bank* case.

2. The decision below is directly in conflict not only with this Court's decision in the *Merchants Bank* case, but with the decisions of other circuit courts of appeals in *Industrial Trust Co.* v. *Commissioner*, 151 F. 2d 592 (C.C.A. 1), certiorari denied, 327 U. S. 788; *DeCastro's Estate* v. *Commissioner*, 155 F. 2d 254 (C.C.A. 2), certiorari denied, 329 U. S. 727; and *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 (C.C.A. 1).

3. No useful purpose can be served, we believe, by further briefs or arguments on the merits of this

[2] Two of the three cases upon which the court below relied (*Commissioner* v. *Upjohn's Estate*, 124 F. 2d 73 (C.C.A. 6); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788 (C.C.A. 10)) antedated this Court's decision in the *Merchants Bank* case. The other (*Commissioner* v. *Robertson's Estate*, 141 F. 2d 855 (C. C. A. 4)) involved a power to invade narrower than the one in the *Merchants Bank* case but does appear inconsistent with that case; reliance upon it by the court below emphasizes the importance of review of its decision.

case. The question here is identical with that in the *Merchants Bank* case, and the facts alleged in the complaint are in all material respects the same. In the exercise of its powers of supervisory review this Court should, we submit, grant the petition for certiorari and summarily reverse the decision below. Cf. *Burnet* v. *J. Rogers Flannery & Co.*, 286 U. S. 524. Uniformity and stability in the administration of the revenue laws are unattainable without adherence by the lower courts to the authoritative rulings of this Court. Acquiescence in the decision below will compel the District Court whose decision was here reversed to subscribe to the views of the court below, though contrary to those of this Court, and may well impel other trial tribunals whose judgments are reviewable by that court to do likewise. Unless the decision below is reversed estates within the jurisdiction of the court below, and of other courts which choose to follow its example, will enjoy preferential tax treatment.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1948.

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